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observed, "it seems hardly just or right that a verdict which never should have been found should be allowed to stand simply because the judge was not asked to prevent its being found."¹¹

RECOVERY FOR DEATH IN COLLISION AT SEA. — In 1808 Lord Ellenborough laid down the rule which has become so firmly fixed in the common law, that "in a civil court the death of a human being could not be complained of as an injury."¹ Although Lord Campbell's Act,² passed in 1846, and similar acts in most American jurisdictions, provide for recovery for death by wrongful act, the effect of Lord Ellenborough's decision is by no means destroyed. Situations not covered by these statutes, where consequently an injury goes remediless, are constantly arising. The principle of Lord Campbell's Act has never been adopted as part of the common law.³

The doctrine of the common law has been applied by courts of admiralty to actions for wrongfully causing death on the sea. Before 1886, a number of lower federal courts held that the common-law rule should not be applied in admiralty, and allowed recovery for death at sea.⁴ These cases, however, were overruled, and the question was finally settled by the Supreme Court in *The Harrisburg*⁵ on the ground that the maritime law, as received by maritime nations generally did not differ on such questions from the law as administered by the civil courts. Neither in England nor by the federal legislature in this country has a statute been passed in terms allowing for recovery for death at sea, so that any claim in admiralty must be based on Lord Campbell's Act and similar statutes in this country. The question whether these statutes give such a right was raised in a recently published case, *The Middlesex*,⁶ in which it was held by the District Court for the District of Massachusetts that no recovery could be had against the owners of a Massachusetts ship by the personal representatives of three sailors on a Maine ship for their death in a collision with the former ship in which it was at fault.

¹¹ *Banbury v. Bank of Montreal*, [1918] A. C. 626, page 675.

¹ *Baker v. Bolton*, 1 Campb. 493. No reason was given by Lord Ellenborough for the decision. An early case, *Higgins v. Butcher*, Yelverton, 89 (1606), had held that a husband could not recover for the death of his wife on a declaration which alleged damage to the wife.

² 9 & 10 VICT., c. 93. One of the earliest statutes of this type was enacted in Massachusetts in 1648. See TIFFANY, DEATH BY WRONGFUL ACT, § 4, note 5.

³ See the dissent of Bramwell, B., in *Osborn v. Gillett*, L. R. 8 Ex. 88 (1873), in which he proclaimed the fallacy of the rule in *Baker v. Bolton*, *supra*.

There are some early American cases *contra* to *Baker v. Bolton*: *Cross v. Guthery*, 2 Root (Conn.) 90 (1794); *Ford v. Monroe*, 20 Wend. (N. Y.) 210 (1838); *Sullivan v. Railroad Co.*, 3 Dill. (Circ. Ct.) 334 (1874). These cases were subsequently overruled.

⁴ *The Sea Gull*, Chase, 145 (1867); *The Towanda*, 34 Leg. Int. 394 (1877); *The Charles Morgan*, 2 Flip. 274 (1878); *The E. B. Ward, Jr.*, 17 Fed. 456 (1883), 23 Fed. 900 (1885); *The Columbia*, 27 Fed. 704 (1886).

For *dicta* to the same effect see cases cited in TIFFANY, DEATH BY WRONGFUL ACT, § 204, note 6.

For a review of these decisions, see *The Harrisburg*, *infra*, note 5.

⁵ 119 U. S. 199 (1886). There are no English cases holding that the rule in admiralty differs from the rule at common law. See *Seward v. The Vera Cruz*, 10 A. C. 59, 66, 70 (1884).

⁶ 253 Fed. 142 (1916).

All ships which have the right to sail under the maritime flag of a state⁷ are under the protection and jurisdiction of that state.⁸ This extraterritorial power of a sovereign over ships at sea is sometimes based on the fiction that the ships are portions of the sovereign's territory.⁹ But the better explanation seems to be that the ships partake of the state's nationality, and that the sovereign's jurisdiction is personal rather than territorial.¹⁰ It therefore lies within the power of the sovereign to protect the ships and persons aboard them against torts on the high sea and to give remedies for such torts which its courts will enforce, and which, under proper conditions, will be recognized by courts of other states.¹¹ Thus the maritime law of Continental countries gives a remedy for death by wrongful act at sea. Recognizing this, the United States Supreme Court, where such an act was committed on board a French ship, enforced the right in a proceeding to limit the liability of the French vessel.¹² The question in the United States and England therefore is whether in each death statute the sovereign has intended to give a remedy for death at sea.

It is to be noted, in considering the American cases, that the fact that the United States Constitution has given Congress power to legislate on this subject¹³ does not, in the absence of such legislation, deprive the state death statutes of effect on the high seas. The general principle is well settled that the mere grant of power to Congress to legislate on certain subjects, without its exercise, does not wipe out state laws on those subjects.¹⁴

There is no question in England but that Lord Campbell's Act does apply to deaths on the high sea.¹⁵ The House of Lords, however, has decided that no action *in rem* can be maintained in admiralty under Lord Campbell's Act because the jurisdiction of that court is limited by the Admiralty Court Act of 1861 to "damage done by a ship," which was held not to cover the injury dealt with in the death statute, and because the latter statute did not provide for a lien.¹⁶ But it is settled that an action *in personam* for death at sea can be brought in common-

⁷ "Private vessels belonging to a state are those which, belonging to private owners, satisfy such conditions of nationality as may be imposed by the state laws with reference to ownership, to place of construction, the nationality of the captain, or the composition of the crew." HALL, PRIVATE INTERNATIONAL LAW, 6 ed., 163.

⁸ *Crapo v. Kelly*, 16 Wall. 610 (1872); *The Hamilton*, 207 U. S. 398 (1907). See HALL, 244.

⁹ For an exposition and criticism of this view, see HALL, 244-49.

¹⁰ HERSHEY, ESSENTIALS OF INTERNATIONAL PUBLIC LAW, § 208, note; HALL, 249; 1 BEALE, CONFLICT OF LAWS, Part I, § 106.

¹¹ See *The Hamilton*, 207 U. S. 398, 403 (1907).

¹² *La Bourgogne*, 210 U. S. 95 (1908).

¹³ This power is derived from the power to regulate interstate and foreign commerce (U. S. CONST., Art. I, § 8) and from the extension of the judicial power of the federal courts to "all cases of admiralty and maritime jurisdiction" (Art. III, § 2).

¹⁴ *American Steamboat Co. v. Chase*, 16 Wall. (U. S.) 522 (1872); *The Hamilton*, 207 U. S. 398 (1907); *McDonald v. Mallory*, 77 N. Y. 546 (1879); *Western Union Tel. Co. v. Call Publishing Co.*, 181 U. S. 92 (1901).

¹⁵ *The Bernina*, L. R. 12 P. D. 58 (1887), affirmed in 13 A. C. 1 (1888); *The Orwell*, L. R. 13 P. D. 80 (1888). See *Seward v. The Vera Cruz*, 10 A. C. 59, 71 (1884).

¹⁶ *Seward v. The Vera Cruz*, *supra*, note 15. Cockburn, C. J., in *Smith v. Brown*, 6 Q. B. 729 (1871), put the lack of jurisdiction of the Admiralty Court on the ground that "damage" meant injury to property only.

law courts, and since the judicature acts of 1873 and 1875, by which the Admiralty Court became a branch of the High Court, it is possible to institute such a suit in the Admiralty Court. Such an action, however, is not an admiralty suit, and is governed by common-law rules as to contributory negligence and damages.¹⁷

The death statutes in this country do not differ greatly in scope from Lord Campbell's Act.¹⁸ The United States Supreme Court has held that such statutes do cover death by wrongful act committed on board ships domiciled in the state although at sea or in the territorial waters of some other state, and that the admiralty courts will enforce such a claim. The leading case is *The Hamilton*,¹⁹ in which Mr. Justice Holmes said of the Delaware statute: "We should add . . . that we construe the statute as intending to govern all cases which it is competent to govern, or at least not to be confined to deaths occasioned on land." Unless the death statute provides for a lien such an action must be *in personam*,²⁰ against the owner of the ship, but if it does provide for a lien the action may be *in rem*, a libel against the vessel.²¹

Thus it appears that the domicile state has jurisdiction over deaths on ships at sea, and that the death statutes allow recovery for such wrongs. It often happens, as in the case of *The Middlesex* cited above, that the death in question is the result of a collision between two ships from different jurisdictions, in which the death statutes differ, so that it becomes important to determine which law is to be applied. A distinction between substantive and procedural law must be made here. A court will apply the procedural law of the *forum*, irrespective of the nationality of the vessels or the parties before it. Thus the Supreme Court permitted the owners of the British ship *Titanic* to limit their liability under American law so far as claims presented in this country were concerned.²² As regards the substantive law, however, it is the law of the domicile of the vessel rather than the law of the *forum* which is applied. It was so held by the Supreme Court in the case of *La Bourgogne*,²³ where a British and a French ship collided, and a claim was made against the owners of the latter for the death of a person aboard the French ship. The court applied the French rule of recovery for wrongful death. It is significant to note that the court applied this rule, not as the law of the jurisdiction of the offending vessel but as the law of the place where the injury occurred.²⁴ That is the usual common-law

¹⁷ The *Bernina*, *supra*, note 15.

¹⁸ See the analytical table of these statutes in TIFFANY, DEATH BY WRONGFUL ACT, xx, *et seq.* The usual provision is for an action whenever death is caused by the wrongful act, neglect, or default of another, such as would have entitled the party injured to maintain an action had he not been killed.

¹⁹ 207 U. S. 398 (1907). See *The Corsair*, 145 U. S. 335, 347 (1891). The same conclusion was reached by the New York Court of Appeals in *McDonald v. Mallory*, 77 N. Y. 546 (1879).

²⁰ The *Corsair*, *supra*, note 19.

²¹ The *Oregon*, 45 Fed. 62 (1892).

²² 233 U. S. , 18 (1913). See DICEY, LAW OF DOMICILE, 153.

²³ 210 U. S. 95 (1908).

²⁴ The court, speaking through Mr. Justice White, said (page 138): "But in *The Hamilton* it was also settled that where the law of the State to which the vessel belongs gives a right of action for wrongful death if such death occurred on the high seas on board of the vessel, the right of action . . . will be enforced. . . ." (In *The Hamilton* the two colliding ships were from the same jurisdiction.)

rule and the rule laid down by most writers on private international law.²⁵ Some Continental countries have applied the law of the jurisdiction of the offending ship, in cases of collision at sea.²⁶

The case of *The Middlesex* presents an additional fact to those in *La Bourgogne*, namely, that the deceased was aboard the innocent vessel, and that the two vessels were from different jurisdictions. The court in deciding that case apparently relied on a *dictum* by Mr. Justice Bradley in *The Scotland*,²⁷ to the effect that if a collision between two vessels of different nationality was being adjudicated in a court of a third jurisdiction, the court would apply the law of the *forum* since it would not be fair to choose between the laws of the jurisdictions of the vessels. It is to be noted that this *dictum* was not overruled by the decision in *La Bourgogne*, since the fact that the deceased was on board the offending ship made it unimportant what the ship collided with. It is submitted, however, that the decision in *The Middlesex*, that the owners of the offending vessel are not liable for these deaths, is not sound. As has been pointed out, the law governing torts is the law of the place where the injury occurred. And that place, in the principal case, was the ship on which the deceased was riding.²⁸ Or it might be proper for the court to apply the law of the jurisdiction of the offending vessel on the ground that it could not complain if held liable under its own law.²⁹ The death statutes in either state, in the principal case, although differing as to the measure of damages, would have allowed recovery.³⁰ Even applying Mr. Justice Bradley's *dictum*, the same result would follow. The suit was brought in a federal court. Hence the law of the *forum*, in the absence of legislation by Congress, must be the state law,³¹ and the court is again driven to a choice between the laws of the two states. The necessity of such a choice should not justify denial of all recovery for this greatest of all injuries. It should be the policy of the courts to extend rather than restrict the operation of death statutes.

RIGHT OF A PUBLIC UTILITY TO CEASE OPERATION AND DISMANTLE ITS PLANT WITHOUT CONSENT OF THE STATE. — At an early date our law recognized that where one devotes his property to a public service such property becomes affected with a public interest and ceases to be *juris*

²⁵ See MINOR, CONFLICT OF LAWS, § 194; BAR, INTERNATIONAL LAW (Gillespie's Trans.), 360, note 2.

²⁶ That is the rule in France: 19 Clunet, 153 (Cass., 4 November, 1891). And in Germany: 14 Steuffert, 335 (Sup. Ct. of Berlin, 25 October, 1859).

Bar lays down the rule that recovery in case of collision at sea is limited by the laws of the jurisdictions of both the claimant and the offending vessel. BAR, 489-90.

²⁷ 105 U. S. 24, 29 (1881).

²⁸ United States v. Davis, 2 Sumner (Circ. Ct.) 482 (1807).

²⁹ In Whipple v. Thayer, 16 Pick. (Mass.) 25 (1834), it was held that where the estate of an insolvent was being administered, the right of a creditor from another state could be limited by the law of his state whether or not there was such a limitation in the law of the *forum*.

³⁰ MAINE REV. STAT., 1903, c. 89, §§ 9, 10; MASS. ACTS OF 1907, c. 375. The offending vessel was domiciled in Massachusetts.

³¹ Western Union Tel. Co. v. Call Publishing Co., 181 U. S. 92 (1901). See 1 BEALE, CONFLICT OF LAWS, Part I, § 112 a.